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No. 83-171

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

TRANSAMERICA COMPUTER COMPANY, INC.,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IBM's opposition skirts the important legal issues raised by the petition. Instead, it diverts attention from those issues by reciting that certiorari is pointless because Transamerica would lose anyway. It ignores the pervasive and undisputed fact that this was a *jury* trial where the jury was improperly instructed on the controlling law. Undisturbed by IBM's opposition are the two core reasons warranting review: (1) the Ninth Circuit held that the jury was improperly instructed on the central issue in this case —predatory pricing—but, by labeling the instructions "irrelevant," found, inferentially, that Transamerica had waived its right to a properly instructed jury by a pretrial stipulation that is silent on the point, and (2) the Ninth

Circuit imposed on Transamerica an extraordinary burden of proof in direct conflict with this Court's *Huddleston* decision[1] and, having done so, proceeded to "interpret" the evidence to conclude that Transamerica had failed to carry that burden. Only by imposing this erroneous burden was the Ninth Circuit able to conclude that "IBM was entitled to judgment as a matter of law" and thus avoid reversing.

IBM's argument that even if Transamerica is right, certiorari should not be granted because Transamerica has "not challenged" the district court's findings on monopoly power and damages disingenuously ignores both the record and the Ninth Circuit's opinion.[2]

I

TRANSAMERICA NEVER WAIVED A PROPERLY INSTRUCTED JURY

The court below held that prices above cost could be predatory and that intent evidence bore heavily on whether they were. But the jury was told just the opposite: that prices above cost were *per se* legal and that intent was irrelevant. Ironically, had IBM won a verdict, reversal would have followed automatically. But the court below ignored both this fundamental legal error and this Court's holdings on waivers of constitutional rights by finding that

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[1] *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983).

[2] IBM Opposition at 9-10. As pointed out at page 11 of Transamerica's petition, the jury found for Transamerica on monopoly power. Further, Transamerica made an extensive and detailed attack on the district court's findings, and the law applied to those findings, on monopoly power and damages. *See* Brief of Appellant Transamerica Computer Company, Inc. at 56-85, 120-36. Finally, the Ninth Circuit *expressly* declined to consider whether the district court erred in its monopoly power and damages findings. *See* Appendix A at 17.

a pretrial stipulation rendered the erroneous instructions "irrelevant."

At the time of the stipulation, the Ninth Circuit's short-lived embrace of cost-based predatory pricing rules was at its peak. Then-Ninth Circuit law endorsed the theory that prices, to be predatory, had to be below marginal cost. *See Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). Transamerica had urged from the beginning that cost-based rules were wholly out of step with time-tested antitrust law and served only to permit, indeed encourage, anticompetitive conduct by dominant firms. Nonetheless, Transamerica, as the last of the West Coast IBM cases to go to trial, recognized that this now-rejected view would likely control its trial unless the law were corrected. It attacked mechanistic cost-based rules at every opportunity, in its case and as *amicus curiae* in the *CalComp* and *Memorex* appeals.

The stipulation represented the only way to ensure that Transamerica's case would get to the Ninth Circuit for review after *one* jury trial—even if (as happened) the jury hung. The stipulation permitted the district court to decide the case if the jury could not, thus ensuring appellate review and an opportunity to correct the law. If Transamerica then persuaded the Ninth Circuit that exclusive reliance on cost-based rules is naive and economically unsound (as it did), the parties and the district court would have saved the time and expense of a second lengthy jury trial *before* appellate review. Perversely, having finally prevailed in correcting the Ninth Circuit's hasty embrace of cost-based rules, Transamerica has been denied the

right to have the correct law applied to its case by the very decision that corrects the law.[3]

Against this brief history of the legal status of cost-based rules when the stipulation was made, the Ninth Circuit's inference *from silence*[4] that the stipulation was intended to waive a properly instructed jury defies reason. All concerned—Transamerica, IBM and the district court—knew that the jury would be instructed consistent with then-current Ninth Circuit law on cost-based rules and that Transamerica would object and, if it lost, seek appellate review of those instructions. To find a waiver from the stipulation is tantamount to finding that Transamerica abruptly abandoned its repeatedly urged position on cost-based rules and agreed that the instructions, whatever they turned out to say, would be unreviewable. Transamerica's conduct before *and* after the stipulation was flatly inconsistent with any such conclusion. *See* Petition at 15-16.

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[3]The Ninth Circuit has recently underscored the conflict in the circuits on predatory pricing and reconfirmed its rejection of exclusive reliance on cost-based rules. *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1298 n.5 (9th Cir. 1983) ("Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act."). IBM does not mention the conflict in the circuits on this important antitrust issue.

[4]IBM says that the court below reviewed the record concerning the stipulation and found that Transamerica had unconditionally consented to the district judge deciding the case. IBM Opposition at 8. The entire record of the stipulation and the circumstances that led to it are reprinted and summarized at page 15 of Transamerica's petition. As is plain from that record, Transamerica stipulated that the district judge could decide the case if the jury hung. There is nothing in that record even to suggest that Transamerica *also* stipulated to waive prejudicial errors in the jury instructions.

IBM's opposition ignores all of this, as well as the absurd consequences of the Ninth Circuit's inference of waiver. It says instead that Transamerica registered no objection to the district court deciding the case after the jury hung. But there was no need to object at that point: *Transamerica had already objected to the instructions and had received the district court's express assurance that all objections were preserved for appellate review. See* Petition at 15-16 and n.11.[5]

The Ninth Circuit's refusal to reverse in the face of prejudicially erroneous instructions denied Transamerica its seventh amendment right to a properly instructed jury. That right was never waived and it is unconstitutional to infer otherwise.

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[5]IBM cites several lower court decisions to support its claim that Transamerica's participation in proceedings after the jury hung somehow waived its objections to the instructions. IBM Opposition at 8. These cases, however, involved either an express waiver of jury trial or statements by the court that it was going forward with a bench trial and the agreement or lack of objection by the party later claiming a right to a jury trial. These cases would be applicable if the district court, after the jury hung, had said that Transamerica, by going forward, would waive its objections to the instructions and Transamerica either agreed or said nothing. Here, the district court had earlier said precisely the opposite.

Moreover, IBM says nothing about the decisions of this Court establishing that jury trial waiver requires "express" consent and that all presumptions are against a finding of waiver. *See* Petition at 14. Nor does it mention that the Ninth Circuit and others have refused to follow the cases relied upon by IBM, holding instead that silent acquiescence does not amount to a waiver. *Palmer v. United States*, 652 F.2d 893, 896 (9th Cir. 1981) and cases therein cited.

II

IBM IGNORES THAT THE NINTH CIRCUIT INVADED THE PROVINCE OF THE JURY AND USED THE WRONG BURDEN OF PROOF

This Court's *Huddleston* decision is unmistakable: the burden of proof in an antitrust case is a preponderance of the evidence and not the clear and convincing burden required by the Ninth Circuit. Why the Ninth Circuit felt free to disregard *Huddleston* and impose on Transamerica an excessive burden is inexplicable.[6] In any event, IBM apparently concedes the error since its opposition fails even to mention it.

The Ninth Circuit held that proof of limit pricing could establish a section 2 violation. But the jury was never instructed on limit pricing and the district court made no findings on the issue, believing that cost-based rules made limit pricing irrelevant. Having no factfinder to review on this issue, the Ninth Circuit became its own factfinder. It first raised the burden of proof and then found that Transamerica had not met this increased burden. *Huddleston* forbids the first aspect of this extraordinary departure from the rules of appellate review and *Continental Ore*[7] condemns the second.

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[6]Transamerica directed the Ninth Circuit's attention to *Huddleston*, which had been decided three weeks before the panel's decision, in its Petition for Rehearing and Suggestion for Rehearing En Banc. The petition and suggestion were rejected.

[7]*Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). *See* Petition at 29-30.

III

PREDATORY PRICING IS ALWAYS IN RESPONSE TO COMPETITION

According to IBM, it prevailed in prior cases and in this one because its price reductions were simply in response to competition. IBM Opposition at 12-13. This fact, we are told, is the "cornerstone" of all prior IBM section 2 cases. It is these decisions that IBM recounts at length in support of its claim that, notwithstanding the errors below, Transamerica's case does not warrant independent review by this Court.

The fact that a monopolist reduces prices in response to competition surely must be the beginning and not the end of the inquiry. Predatory pricing, by definition, is *always* in response to competition. The test for predatory pricing adopted by the court below recognizes this.

IBM won earlier cases in part because lower courts accepted the false notion that price reductions are not predatory if they are in response to competition. Those same courts accepted IBM's claims that its pricing conduct was necessary for it to survive and that, even as reduced, its prices were always highly profitable. Earlier plaintiffs were not prepared to challenge those claims. Transamerica demonstrated that the fundamental legal premises of the earlier cases were false. Transamerica also proved that the factual premises were false and, against the enormous momentum of the prior cases, those issues went to the jury.[8] But, as the court below has now made clear, the jury was given the wrong law to apply (in the case of cost-based rules) and was not given the law at all (in the case of limit pricing). But despite these favorable

[8] *See* Petition at 26-29.

instructions for IBM, the jury did not decide for IBM—it hung.

These facts certainly suggest, even to a disinterested observer, that serious mistakes characterized the earlier cases. Just because Transamerica proved that the antitrust theory of the earlier cases was wrong and, in the face of those cases, got to a jury may not, standing alone, entitle it to review by this Court. But certainly the results of those earlier cases should not, as IBM asserts, provide a basis for denying review.

To correct the inequity of an unconstitutional denial of Transamerica's right to a properly instructed jury and to resolve the hopeless conflict in the circuits on an important and recurring issue of section 2 law, this Court should grant the petition.

Respectfully submitted,

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